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BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
A SUBSTANTIAL DEVELOPMENT PERMIT)
DENIED BY KITSAP COUNTY TO)
STATE OF WASHINGTON,)
DEPARTMENT OF NATURAL RESOURCES,)
STATE OF WASHINGTON,)
DEPARTMENT OF NATURAL RESOURCES;)
DEPARTMENT OF FISHERIES;)
DOUG LYLE; AND GILBERT FRANCKLYN,)
Appellants,)
v.)
KITSAP COUNTY,)
Respondent.)
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)
Amicus Curiae)

SHB No. 78-37

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the review of Kitsap County's denial of a shoreline substantial development conditional use permit to State of Washington, Department of Natural Resources, was brought before the Shorelines Hearings Board, Nat W. Washington, Chairman, Chris Smith, Rodney

1 Kerslake and James E. Connolly on April 7, 8, 9, and 10, 1980, in
2 Lacey, Washington. Hearing Examiner William A. Harrison presided.

3 Appellant, Department of Natural Resources, appeared by David A.
4 Batemen, Assistant Attorney General; appellant, Department of
5 Fisheries, appeared by Dennis D. Reynolds, Assistant Attorney General;
6 appellants Doug Lyle and Gilbert Francklyn also appeared. Respondent,
7 Kitsap County, appeared by Patricia K. Schafer, Deputy Prosecuting
8 Attorney; Department of Ecology, Amicus Curiae, appeared by Robert V.
9 Jensen, Assistant Attorney General.

10 Having read and heard the testimony, having examined the exhibits,
11 having viewed the site of the proposed development, having read the
12 Hearing Memoranda, having the heard the arguments of counsel and being
13 fully advised, the Shorelines Hearings Board makes the following

14 FINDINGS OF FACT

15 I

16 This matter arises in Agate Pass in Kitsap County. The Department
17 of Natural Resources (DNR) manages 4 tracts of subtidal public lands
18 at that location. In 1972, 3 of the 4 tracts were leased to Gilbert
19 Francklyn for the purpose of harvesting clams. For the ensuing six
20 years, until 1978, Francklyn directed the harvest of clams through use
21 of a mechanical clam harvester. This activity is regulated by a
22 permit process administered by the Department of Fisheries (DOF).

23 On May 17, 1978, DNR filed an application for a shoreline
24 management substantial development permit with Kitsap County under the
25 Shoreline Management Act, chapter 90.58 RCW. The proposed development
26 consisted of "continual harvesting of subtidal hardshell clams with
27

1 the use of mechanical harvester."¹ The mechanical harvester used
2 prior to the DNR application, and proposed under it, consists of a
3 diesel powered vessel having the appearance of a small commercial
4 fishing boat. To this is attached the top of a conveyor belt system
5 which extends below water to the substrate. Hydraulic pressure is
6 used to loosen the substrate and dislodge clams found there, which are
7 then carried by the conveyor belt to the vessel above.

8 II

9 The Kitsap County Board of County Commissioners denied the DNR
10 application on September 7, 1978, under authority of the Kitsap County
11 Shoreline Master Program adopted in July, 1977. Upon request for
12 review this Board reversed on grounds that said master program had not
13 been approved and adopted by the Department of Ecology so as to be
14 effective at the time of DNR's application. The matter was remanded
15 to Kitsap County for application of the Kitsap County Shoreline Master
16 Program adopted July 1, 1976, while this Board retained jurisdiction.

17 The Kitsap County Board of County Commissioners subsequently
18 applied the Master Program of July 1, 1976, and denied the DNR
19 application again on October 15, 1979. From this appellants request
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21

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23 1. The application also referenced the final environmental impact
24 statement which describes the proposal as "harvesting of subtidal
25 hardshell clams with a hydraulic escalator shellfish harvester."
26

1 review.

2 III

3 Agate Pass is an important clam site in that there are only .
4 limited subtidal areas in Puget Sound where clams set and grow
5 abundantly. Agate Pass is one of these because of its optimum
6 combination of swift water currents and coarse substrate.

7 Harvesting on the 3 tracts between 1973 and 1978 has yielded
8 butter, littleneck and horse clams totaling the following weights, in
9 pounds:

10	1973	-	464,988
11	1974	-	240,316
12	1975	-	305,258
13	1976	-	330,492
14	1977	-	270,575
15	1978	-	240,970

16 Adequate spawning stock exists off of the tracts to restore clam
17 stocks on the tracts by the natural movement of seed carried by the
18 currents. Because of this a maximum sustained yield, 3 species
19 combined, for the 3 tracts, may be estimated as 274,000 annually.

20 The 3 tracts now have two or more times the clam density, 3
21 species combined, considered commercially harvestable despite the six
22 years of mechanical harvesting. While natural restoration may result
23 in different proportions of butter, littleneck and horse clams than
24

1 existed previously, all of these species are of substantial commercial
2 value.

3 It is not probable that the proposed mechanical clam harvesting
4 will deplete or over-harvest the clam resource at the site in question.

5 IV

6 The currents of Agate Pass will disperse siltation from mechanical
7 harvesting quite rapidly. Likewise, the coarse substrate of the
8 tracts provides minimal fine material of the type which causes
9 siltation. Siltation from mechanical clam harvesting in this area
10 will not significantly injure underwater plant life.

11 Eelgrass exists primarily at the shallow border of the 3 tracts,
12 and kelp is located on the rocky areas least suitable to mechanical
13 clam harvesting. Harvesting on the 3 tracts has reduced eelgrass and
14 macroalgae population although this effect has been mitigated to a
15 large degree by natural regeneration.

16 Because of substrate conditions over most subtidal area, neither
17 eelgrass nor kelp would grow abundantly in Agate Pass, relative to
18 other waters, even assuming no mechanical clam harvesting. Puget
19 Sound, generally, is sufficiently nutrient rich so that any net
20 reduction in kelp or other macroalgae which harvesting is likely to
21 cause will have no significant effect on marine food chains.

22 V

23 Areas within the tracts have been identified by Department of
24 Fisheries (DOF) as potential ling cod spawning areas. Because of
25 this, DOF will not allow mechanical clam harvesting there until it
26 carries out further studies to determine if, in fact, any damage to
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1 ling cod could occur. These areas are approximated by the
2 cross-hatching on exhibit R-20.

3 The results of the studies just described should be presented to
4 both Kitsap County and the Department of Ecology.

5 VI

6 Subtidal mechanical clam harvesting in Puget Sound, and even Agate
7 Pass, is in an incipient stage. All parties concerned will benefit
8 from careful review of its effects. The present application of DNR
9 should therefore be permitted under a permit for a fixed term to
10 allow re-evaluation based upon facts which will arise in the future.

11 A baseline study should also be conducted on the unharvested
12 northeast tract (no. 10501) to inventory species and quantity of clams
13 and other major marine plant and animal species. This must occur
14 prior to harvesting of the northeast tract so as to provide a basis
15 for before and after comparison. This study should be conducted by
16 the Department of Fisheries and the results presented to Kitsap County
17 and the Department of Ecology.

18 VII

19 The normal background noise level in Agate Pass varies from 42-50
20 dBA. With the operation of the mechanical clam harvester in the past,
21 this level has reached 60 dBA. The harvester has operated throughout
22 the day and night in the past. This noise has unreasonably interfered
23 with enjoyment of life and property by persons residing on the shores
24 of Agate Pass. Noise from the harvester primarily emanates from its
25 two diesel engines. Although action has been taken to reduce this
26 noise, further reduction is practical. Limitations on both peak and
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1 duration of noise are necessary to prevent unreasonable interference.

2 The mechanical clam harvester should result in peak noise level,
3 in the receiving area on the shores of Agate Pass, of no more than 55
4 dBA. The mechanical clam harvester should not operate except between
5 the hours of 7:00 a.m. and 10:00 p.m. Monday through Friday. These
6 hours of operation were stipulated by appellants on the record at
7 hearing.

8 VII

9 It is not probable that the proposed mechanical clam harvesting
10 will result in trespass. The authority to control such a problem
11 resides in the police power of the county as well as with the
12 licensing power of the Department of Fisheries.

13 IX

14 Any Conclusion of Law which should be deemed a Finding of Fact is
15 hereby adopted as such.

16 From these Findings the Board enters the following

17 CONCLUSIONS OF LAW

18 I

19 The DNR application is for a shoreline substantial development and
20 conditional use permit. As such it must be consistent with (1) the
21 provisions of the Shoreline Management Act, chapter 90.58 RCW and (2)
22 the Kitsap County Shoreline Master Program of 1976. RCW
23 90.58.140(2)(b). See also this Board's Order on Pre-Hearing Motions
24 entered May 29, 1979, and Agreed Order of Remand entered June 20,
25 1979, herein.

1 II

2 The site in question is a shoreline of state-wide significance.
3 RCW 90.58.030(2)(e)(iii). The proposed mechanical clam harvesting
4 constitutes an activity of state-wide interest, can result in long
5 term over short term benefit and can protect the resources and
6 ecology of the shoreline, as prescribed for shorelines of statewide
7 significance by RCW 90.58.020. Likewise, subtidal mechanical clam
8 harvesting, as proposed, is unique to use of the water area, and as
9 such is a preferred use. RCW 90.58.020.

10 III

11 The Kitsap County Shoreline Master Program of 1976 (KCSMP) defines
12 aquaculture as the "culture or farming of . . .shell fish . . ." Part
13 7, II, p. 18. It is the policy of Kitsap County that:

14 "Aquaculture should be encouraged in Kitsap
15 County and so located to be compatible with
16 navigation and upland use."
KCSMP, id, supra.

17 Aquaculture is permitted as a conditional use in the semi-rural
18 environment, KCSMP, id, supra, which includes the site in question,
19 FCSMP, Part 4, p. 9.

20 The KCSMP criteria for permitting a conditional use is at Part 8,
21 II, p. 53::

22 Conditional use permits shall be granted only
23 after the applicant can demonstrate all of the
following:

24 1. The use will cause no unreasonably adverse
25 effects on the environment or other existing
26 or potential uses which are allowed outright
in the subject environment;

- IV

1. That the shoreline substantial development and conditional use permit prescribed herein shall expire five years after final approval by Department of Ecology.
2. That noise from the mechanical clam harvester shall not intrude into the on-shore property of others at levels above 55 dBA; provided, however, that this level may be exceeded as provided for day time operation under WAC 173-60-040(2)(c) and Kitsap County Ordinance 10.28.040(c). The mechanical clam harvester shall not operate except between the hours of 7:00 a.m. and 10:00 p.m.,³ Monday

3. This condition is consistent with the interpretation given by Kitsap County to its noise ordinance, 10.28 and also consistent with the position of Department of Ecology, amicus curiae in this matter, concerning its noise regulation, chapter 173-60 WAC. In this case we must apply the Kitsap County Shoreline Master Program provisions quoted in Conclusion of Law III, above. In doing so we independently reach the noise limitations set forth above by application of the Kitsap County Shoreline Master Program to the facts of this case. See WAC 173-60-060 allowing regulation of noise as a nuisance notwithstanding the specific requirements of chapter 173-60 WAC. We construe the regulatory wording of the Kitsap County Shoreline Master Program to fall within WAC 173-60-060 in this matter.

1 through Friday.

2 3. That prior to mechanical clam harvesting
3 on the northeast tract (no. 10501) a baseline
4 study shall be conducted by the Department of
5 Fisheries to inventory species and quantity of
6 clams and other major marine plant and animal
7 species and to gather any further information
8 about the tract which is deemed proper by
9 Department of Fisheries. The results of this
10 baseline study shall be presented to Kitsap
County and Department of Ecology.

11 4. The results of Department of Fisheries
12 studies in the areas identified as potential
13 ling cod spawning areas (Exhibit R-20, SHB
14 78-37) shall be presented to Kitsap County and
15 Department of Ecology.

16 V

17 Any Finding of Fact which should be deemed a Conclusion of Law is
18 hereby adopted as such.

19 From these Conclusions the Board enters the following

20 ORDER

21 The action of Kitsap County is reversed and this matter is
22 remanded to Kitsap County for issuance of a shoreline substantial
23 development and conditional use permit containing the conditions
24 listed in Conclusion of Law IV, above.
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27

1 DONE at Lacey, Washington this 15th day of April, 1980.

2 SHORELINES HEARINGS BOARD

3 Wm W. Washington
4 W. W. WASHINGTON, Chairman

5 Chris Smith
6 CHRIS SMITH, Member

7 Rodney M. Kerslake
8 RODNEY KERSLAKE, Member

9 James E. Connolly
10 JAMES E. CONNOLLY, Member

CERTIFICATION OF MAILING

I, Trish Ryan, certify that I mailed, postage prepaid, copies of the foregoing document on the 16th day of April, 1980, to each of the following-named parties at the last known post office addresses, with the proper postage affixed to the respective envelopes:

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